

MEMORANDUM OF LAW

DATE: February 1, 1996

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Temporary Help Agencies

QUESTION PRESENTED

May the City use temporary employment agencies to replace or augment the City's clerical pool?

SHORT ANSWER

No. The use of employees from temporary employment agencies in lieu of the City's clerical pool would violate the civil service provisions of the San Diego City Charter.

BACKGROUND

The City has instituted a Streamlining and Efficiency Program ("STEP"). The purpose of STEP is to look at ways in which the City can streamline its work practices by eliminating or changing inefficient policies and procedures. The program seeks to improve the City's competitiveness. During the STEP process, management and employees met to review current City practices and recommend changes in those practices where necessary. The recommendations which evolved from the STEP process are part of an overall effort to increase the productivity and efficiency of the City.

One of the STEP recommendations is that the City employ temporary employees, through a temporary employment agency, to replace or augment the City's clerical pool. You have asked if non-City personnel may be employed in this fashion.

ANALYSIS

Questions regarding personnel issues must be answered with reference to the civil service provisions of the San Diego City Charter ("Charter") and the San Diego Municipal Code ("SDMC"). Charter section 122, mandates that all positions in the classified service be filled by someone from the appropriate eligible list. An individual on an eligible list has been through the civil service examination process and meets the minimum requirements for the position to be filled and is, therefore, approved for the job classification. Only in the case of an

emergency is an exception to the eligible list requirement permitted. This exception is found in Civil Service Rule VII, Section 6, which states that "In case of extreme emergency, when it is in the interest of public safety, health, welfare or economy to employ persons most readily available for the performance of certain work, an appointing authority may secure the necessary help wherever possible, irrespective of the existence of suitable eligible lists." SDMC Section 23.0807.

Members of the clerical pool are classified employees. The purpose of the clerical pool is to assist departments when regular employees are absent, or during periods of extra-heavy work loads. All members of the clerical pool must be on the appropriate eligible list and, therefore, meet the requirements of Charter section 122. Using clerical workers from temporary employment agencies who are not classified through the civil service process and are therefore not on an appropriate eligible list, would violate the provisions of the San Diego City Charter and Personnel Regulations. (Personnel Regulations, M-3.)

Finally,

courts have implied certain limits as essential to protect the civil service mandate against dissolution and destruction. . . . Typically, courts have articulated tests for determining whether employment of non-civil-service personnel violates these implied limitations. For example, under the "nature of the services test" the court inquires as to whether the nature of the contracted services is such that they could have been performed by a civil servant. If so, the agency must proceed under the civil service mandate.

Professional Engineers v. Department of Transportation, 13 Cal. App. 4th 585, 592-593 (1993) (citations omitted).

Although, *Professional Engineers* is a state civil service case and refers to the constitutional provisions governing the state civil service system, similar provisions regarding the City's civil service system are found in the City Charter. The arguments set forth in *Professional Engineers* are, therefore, readily applicable to the City. It is clear that the services presented in your scenario for contracting out are such that they can easily be performed by the clerical pool. Thus, the "nature of the services test" would indicate that the work should stay within the civil service system.

CONCLUSION

Civil service regulations provide that only employees who are on an eligible list may perform jobs for the City absent specific

authorization. No provisions in the civil service rules or regulations allow use of outside employees to circumvent the civil service regulations. Finally, the nature of the services mandates they stay within the civil service system.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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